

**FORM 13  
INITIAL BRIEF OF APPELLANT**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

Kenji Kilgore,

Appellant,

v.

Estate of Samuel Joe Dixon, Samuel Joe Dixon,  
and Fredda Dixon

Appellee.

INITIAL BRIEF OF APPELLANT

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SEP 21 2017

SC Court of Appeals



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September 18, 2017

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## STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE APPELLANT SUFFICIENTLY ALLEGED THE ELEMENTS OF NEGLIGENCE IN HIS CAUSE OF ACTION
- II. WHETHER THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS

## STATEMENT OF THE CASE

Appellant filed this action for the tortious injuries he suffered when deceased Samuel Joe Dixon shot him five times.

Sometime prior to July 2012, Appellant began living in a house/trailer located at 240 Thomson Road, Starr, in Anderson County. Said property is owned by Appellee Spouses Dixon. Appellant was a roommate with Joe Dixon, son of Appellee Spouses. They had a harmonious relationship which can be considered as friendly, during Appellant's stay at the aforementioned property. Appellee Spouses expressed happiness/gratitude in having him as a tenant on their property as they had notice that their son's behavior had gotten better. Appellant had no idea that they were talking about their son's violent/volatile behavior.

On or about July 2, 2012, Joe Dixon shot Appellant five times, without provocation, inside the rented house/trailer. Several days after shooting Appellant, Joe Dixon committed suicide.

On July 1, 2015, Appellant filed a Complaint against the Estate of Joe Dixon and Spouses Dixon for negligence. On November 9, 2015, Appellee Spouses filed their Answer, and moved to dismiss the case for lack of cause of action on March 3, 2016. A hearing was schedule for the motion, but Appellant's former counsel failed to appear due to lack of notice.

Appellee Spouses offered to settle the case, which the Appellant did not act upon/accept. Appellant had a change of counsel. Without giving new counsel the opportunity to conduct discovery proceedings, the Court ordered the dismissal of the case on January 24, 2017.

Appellant moved to reconsider the aforesaid Order on February 2, 2017, which the Appellee Spouses opposed on February 8, 2017. On May 8, 2017, the Court denied the Appellant's motion for reconsideration. Thus, this Appeal was brought.

### **STANDARD OF REVIEW**

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe*, 373 S.C. at 395, 645 S.E.2d at 247. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007).

### **ARGUMENTS**

#### **I. APPELLANT SUFFICIENTLY ALLEGED THE ELEMENTS OF NEGLIGENCE**

In order to establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Rickborn v. Liberty Life Insurance, Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996).

Appellant reiterates that Appellee Spouses had a duty to exercise that degree of care that a reasonable and prudent person would have exercised under the same and similar circumstances, including the duty to warn him of their son's mental health and violent behavior. While it is true that under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger, the court in *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) recognized five exceptions to this rule:

- (1) where the defendant has a special relationship to the victim;
- (2) where the defendant has a special relationship to the injurer;
- (3) where the defendant voluntarily undertakes a duty;
- (4) where the defendant negligently or intentionally creates the risk; and,
- (5) where a statute imposes a duty on the defendant. See generally, Hubbard & Felix, *The South Carolina Law of Torts* 57-72 (1990). Id.

Appellant contends that this case presents a novel issue which the Court may regard as special circumstance that may warrant a duty to warn on the part of the Appellant. Not only are the Appellees the parents of the injurer, who suffers from mental illness and has violent tendencies, but also, the landlord of the Appellant, the victim of their son's criminal act.

Appellant reiterates that the parental relationship between the Appellees and deceased Joe Dixon, the injurer, charges the Appellees with the ability to control and supervise their son, who lived on their property. *Doe v. Batson*, 338 S.C. 291, 296, 525 S.E.2d 909, 911 (Ct. App 1999) (*hereinafter referred as Batson I*). and the case of *Rowe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014) laid down this doctrine:

“The defendant may have a common law duty to warn potential victims under the ‘special relationship’ exception when the defendant ‘has the ability to monitor, supervise and control an individual’s conduct’ and when ‘the individual has made a specific threat of harm directed at a specific individual.’” Doe v. Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting Bishop, 331 S.C. at 86, 502 S.E.2d at 81). It is not necessary for the injuring party to have made a threat while under the defendant’s control or custody. Bishop, 331 S.C. at 88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. “

Appellant believes that Appellees had the ability to monitor, supervise or control deceased Joe Dixon. Deceased son, despite not living under the same roof as the Appellees, was residing right behind the Appellees’ house. With exercise of due diligence, the Appellees could have or should have easily walked over to their son’s trailer/house to check on, monitor or supervise their son, considering that they knew of his mental illness and dangerous nature. That they are aware of their son’s health problems was apparent with their previous conversation with the Appellant. Appellees told Appellant that their son “was doing better”. Undoubtedly, Appellees had notice and/or knowledge of his mental issues, as well as volatile behavior.

Appellant argues that Appellees knew or should have known of a specific threat made to harm a specific person. They had already coaxed him into returning home from his marital home, following the devastating dissolution of his marriage. In this case, the specific threat was the mental condition of their son, who was capable of violence as evidenced by his shooting of the Appellant and his subsequent suicide. The specific person to be harmed was Appellant since he lived and stayed in the same house/trailer as the deceased.

As Appellant’s landlord, Appellees had a duty to reasonably maintain safe conditions on their property. Under the special circumstances of this case, Appellant argues that a part of the safe conditions required disclosure of Appellees’ son’s mental illness. Having knowledge of

their son's volatile behavior and his ever-increasing mental instability, the Appellees were required to exercise a greater degree of care to secure the physical welfare of their tenant. This should be differentiated from a case where the criminal act or threat of harm comes from a third person, who is acting with complete cognizance of the act. In this case, the Appellees knew of their son's mental illness, but still allowed Appellant to rent their property and become roommates with their son and in turn, allowed Appellant to risk his life. What makes it worse is the reckless and/or negligent disregard of Appellant's welfare, by withholding information regarding what was truly an unstable, explosive environment. They deprived Appellant of the ability to weigh the pros and cons of leasing from them. In this sense, Appellees intentionally or recklessly created the risk of harm to the Appellant found herein.

In the alternative, Appellants argue that Appellees are liable for their negligence in failing to exercise that degree of care which a reasonably prudent people would have exercised under the same and similar circumstances.

It has long been held that the court cannot grant of a motion to dismiss for failure to state facts sufficient to constitute a cause of action if the facts alleged in the complaint, and inferences reasonably deducible therefrom, if proven, would entitle the plaintiff to relief on any theory of the case. *Newton v. South Carolina Public Railways Comm'n*, 319 S.C. 430, 462 S.E.2d 266 (1995); *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). Appellant has sufficiently averred the cause of action for negligence on the part of Appellees.

## **II. APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS.**

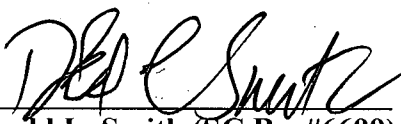
The undersigned counsel was retained by Appellant a month before the January 24, 2017 Order. Very little discovery has been conducted in this matter. Counsel should be allowed to pursue discovery, especially given the traumatic events which took place, and the subsequent

mental scarring that followed an unbelievable experience. Outstanding motions prevented him from conducting discovery. Appellant believes that discovery will provide court with the necessary evidence to allow him to have his day in Court. In this regard, it is akin to the *Batson I* case, where the Court declined to impose summary judgment before sufficient discovery could be completed. Whether the Appellees had a duty to Appellant will be ferreted out with the completion of the aforementioned discovery.

**CONCLUSION**

For all of the foregoing reasons, Appellant prays that this Honorable Court reverse the final judgment dismissing the case, and remand the same for further proceedings in the trial court with instructions regarding the completion of discovery.

September 18, 2017

  
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Attorney for Appellant

**FORM 7  
PROOF OF SERVICE  
FILING INITIAL BRIEF OF APPELLANT AND  
DESIGNATION OF MATTERS TO BE INCLUDED IN RECORD ON APPEAL**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Judge

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Appellate Case No. 2017-001330

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Kenji Kilgore,

Appellant,

v.

Estate of Samuel Joe Dixon, Samuel Joe Dixon,  
and Fredda Dixon

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Appellee **RECEIVED**

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**SC Court of Appeals**

**PROOF OF SERVICE**

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I certify that I have served the Initial Brief of the Appellant and Appellant's Designation of Matters to be Included in the Record on Appeal to the Appellate Clerk of Court and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, and Respondents, by and through their counsel of record, Robert E. Davis, Esquire at Ward Law Firm, PA, 233 S. Pine St., Spartanburg, SC 29301, by depositing a copy of it in the United States Mail, postage prepaid, on September 18, 2017.

Anderson, South Carolina  
September 18, 2017



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**FORM 8**  
**LETTER TO APPELLATE CLERK OF COURT**

September 18, 2017

The Honorable Jenny Abbott Kitchings  
Clerk of Court South Carolina Court of Appeals  
Post Office Box 11629  
Columbia SC 29211

**RE: Kenji Kilgore v. Estate of Samuel Joe Dixon, Samuel E. Dixon and  
Fredda Dixon  
Appellate Case No. 2017-001330**

Dear Honorable Kitchings:

Enclosed for filing are an original and a copy of :

1. Initial Brief of the Appellant;
2. Form 14 Appellant's Designation of Matters to be Included in the Record on Appeal; and,
3. Proof of Service.

Please return a time-stamped copy of each document in the enclosed self-addressed, stamped envelope.

Sincerely,



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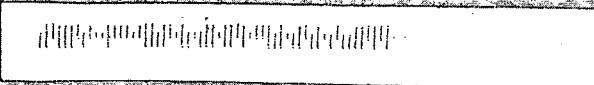
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Robert E. Davis, Esquire

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